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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**  
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11 William Richard Patton,  
12 Plaintiff,

13 v.

14 Ann Ash, et al.,  
15 Defendants.  
16

No. CV-19-00209-TUC-RM

**ORDER**

17 Pending before the Court is Plaintiff's Motion for Leave to Amend First Amended  
18 Complaint ("FAC") (Doc. 53) and lodged proposed Second Amended Complaint  
19 ("SAC") (Doc. 53 54). Defendants responded to the Motion but do not oppose the request  
20 for leave to amend. (Doc. 59.) Leave to amend will be granted and Defendants will be  
21 required to answer the SAC.

22 **I. Second Amended Complaint**

23 Plaintiff seeks to amend Paragraph 17 of his FAC, which recounts events during  
24 medical visits on January 9, 10, and 11, 2018. (Doc. 54 at 9-10, 13.) The FAC alleges that  
25 while Plaintiff was receiving treatment for his foot on January 9, 2018, another inmate,  
26 "Green," loudly commented that the foot appeared to be infected. (*Id.*) The FAC further  
27 alleges that on January 10, 2018, Plaintiff received a shot in his foot from Defendant  
28 Estrada that was very painful and did not alleviate his pain. (*Id.*) The FAC further alleges

1 that on January 11, 2018, Plaintiff again received treatment and then went into Defendant  
2 Cox's office, where he told her that his foot was in a lot of pain and that he was taking  
3 Ibuprofen frequently. (*Id.*) Defendant Cox then told Plaintiff that he was taking  
4 "gabapentin" and "endomethicin" for his "CMT"<sup>1</sup> and that he should not take Ibuprofen  
5 because of a potentially fatal drug interaction, but she did not order anything else for  
6 pain. (*Id.*) The FAC states that that was "the end of the conversation" and that Cox  
7 "didn't want to see [Plaintiff's] foot or anything else." (*Id.*)

8 The proposed SAC slightly amends the factual allegations in paragraph 17. (Doc.  
9 54 at 13.) The SAC alleges that on January 9, 2018, Plaintiff received treatment from  
10 Nurse Avilez (not a named Defendant), who "had done a much better job treating"  
11 Plaintiff than Nurse Estrada. (*Id.*) The SAC alleges that while Estrada would simply have  
12 Plaintiff soak his foot and change his own bandage, Nurse Avilez would clean it, pat it  
13 dry, apply antibiotic cream, and wrap it with gauze "with competency and compassion."  
14 (*Id.*) The SAC states that inmate Green loudly commented on the infected appearance of  
15 Plaintiff's foot on both January 9 and January 11, 2018. (*Id.*) The SAC alleges that on  
16 January 10, 2018, Defendant Estrada gave Plaintiff a shot after his foot soak that "hurt  
17 immensely." (*Id.*) Plaintiff did not allow Estrada to administer the second shot and states  
18 that the shot "did absolutely nothing" for his pain. (*Id.*) The SAC further alleges that on  
19 January 11, 2018, after inmate Green "caused another scene in the waiting room" by  
20 yelling about the appearance of Plaintiff's foot, Plaintiff again received treatment,  
21 specifically a foot soak, from Defendant Estrada. (*Id.*) Plaintiff then followed Defendant  
22 Estrada into Defendant Cox's office, where Defendant Cox typed on her computer and  
23 Plaintiff could not see what she was typing. (*Id.*) The SAC alleges that Plaintiff told  
24 Defendant Cox that his foot was in a lot of pain and that he was taking Ibuprofen  
25 frequently, and that Cox told him that he should not take Ibuprofen because it could cause  
26 a fatal drug interaction with the "gabapentin" and "endomethicin" which he was already

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<sup>1</sup> Plaintiff is diagnosed with Charcot-Marie-Tooth disease. (Doc. 22 at 4.)

1 taking. (*Id.*) The SAC further alleges that Defendant Cox did not order or give Plaintiff  
 2 anything else for his pain and that that was the end of the conversation. (*Id.*)

### 3 **II. Leave to Amend**

4 A party may amend its pleading once as a matter of course within 21 days of  
 5 serving it. Fed. R. Civ. P. 15(a)(1)(a). In all other cases, a party may amend its pleading  
 6 only with the opposing party's written consent or with leave of court, which should be  
 7 freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). Factors relevant in  
 8 determining whether leave to amend should be granted include "undue delay, bad faith or  
 9 dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
 10 amendments previously allowed, undue prejudice to the opposition party by virtue of the  
 11 allowance of the amendment, [and] futility of amendment." *See Day v. LSI Corp.*, 174 F.  
 12 Supp. 3d 1130, 1152 (D. Ariz. 2016), *aff'd*, 705 F. App'x 539 (9th Cir. 2017); *see also*  
 13 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) ("The party  
 14 opposing amendment bears the burden of showing prejudice.").

15 The Court finds that Plaintiff should be granted leave to amend. There is no  
 16 evidence in the record of undue delay, bad faith on the part of Plaintiff, or repeated  
 17 failure to cure deficiencies in the Complaint. Defendants have not alleged prejudice as a  
 18 result of the proposed amendment, and the Court does not find any. The proposed  
 19 changes are minor and, although Defendants Cox and Marshall have filed a Motion for  
 20 Summary Judgment (Doc. 42), that Motion has yet to be fully briefed and ruled upon.<sup>2</sup>  
 21 Furthermore, the pending Motion for Summary Judgment does not address the merits of  
 22 Plaintiff's claims but argues only that Defendants Cox and Marshall are entitled to  
 23 absolute immunity as a result of their status as commissioned officers of the Public  
 24 Health Service. (*See id.*) In response to the Motion to Amend, Defendants state that they  
 25 do not oppose the amendment on procedural grounds but request that the pending Motion  
 26 for Summary Judgment apply to the SAC. (Doc. 59.) In the interest of judicial economy,  
 27 the Court will grant that request, as the pending Motion for Summary Judgment is

28 <sup>2</sup> All Defendants have until February 17, 2021 to file dispositive motions addressing the  
 merits of Plaintiff's claims. (Doc. 52.)

1 equally applicable to the SAC. Accordingly, the Court will grant leave for Plaintiff to file  
 2 the SAC and will construe the pending Motion for Summary Judgment as applying to the  
 3 SAC.

### 4 **III. Statutory Screening of Prisoner Complaints**

5 The Court is required to screen complaints brought by prisoners seeking relief  
 6 against a governmental entity or an officer or an employee of a governmental entity. 28  
 7 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff  
 8 has raised claims that are legally frivolous or malicious, that fail to state a claim upon  
 9 which relief may be granted, or that seek monetary relief from a defendant who is  
 10 immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

11 A pleading must contain a “short and plain statement of the claim showing that the  
 12 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does  
 13 not demand detailed factual allegations, “it demands more than an unadorned, the-  
 14 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
 15 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere  
 16 conclusory statements, do not suffice.” *Id.*

17 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
 18 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,  
 19 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content  
 20 that allows the court to draw the reasonable inference that the defendant is liable for the  
 21 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for  
 22 relief [is] . . . a context-specific task that requires the reviewing court to draw on its  
 23 judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific  
 24 factual allegations may be consistent with a constitutional claim, a court must assess  
 25 whether there are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

26 But as the United States Court of Appeals for the Ninth Circuit has instructed,  
 27 courts must “continue to construe pro se filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,  
 28 342 (9th Cir. 2010). A “complaint [filed by a pro se prisoner] ‘must be held to less

1 stringent standards than formal pleadings drafted by lawyers.” *Id.* (quoting *Erickson v.*  
2 *Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

3 Liberally construed, Plaintiff has stated a *Bivens* claim against Defendants Ash,  
4 Bowles, Estrada, Cox, and Marshall in Count One, as set forth in the Court’s previous  
5 Screening Order. (Doc. 21 at 9-10.) Plaintiff has also stated a Federal Tort Claims Act  
6 claim against the United States in Count Two, as set forth in the Court’s previous  
7 Screening Order. (*Id.* at 11.) Defendants shall be required to answer the SAC for the same  
8 reasons set forth in the previous Screening Order.


9 Accordingly,

10 **IT IS ORDERED THAT:**

- 11 (1) Plaintiff’s Motion for Leave to Amend First Amended Complaint (Doc. 53) is  
12 **granted**. The Clerk of Court is directed to file the proposed Second Amended  
13 Complaint (lodged at Doc. 54) as the Second Amended Complaint.
- 14 (2) Defendants Ash, Estrada, Bowles, Cox, Marshall, and United States of  
15 America must answer the Second Amended Complaint or otherwise respond  
16 by appropriate motion within the time provided by the applicable provisions of  
17 Rule 12(a) of the Federal Rules of Civil Procedure.
- 18 (3) Defendants Cox and Marshall’s Motion for Summary Judgment (Doc. 42) is  
19 effective as to the Second Amended Complaint and will be resolved by  
20 separate Order.

21 Dated this 26th day of August, 2020.

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Honorable Rosemary Márquez  
United States District Judge